Supreme Court, U.S.
FILED

No. 991855 MAY 16 2000

OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

WILLIAM H. VIEHWEG
Petitioner

vs.

SUSAN H. MELLO
Respondent

On Petition for Writ of Certiorari
to United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. VIEHWEG
114 West 2nd South
Mt. Olive, Illinois 62069
Phone: (217) 999-5061
Petitioner

21PP

QUESTION PRESENTED FOR REVIEW

The question before the court is whether the Eighth Circuit Court of Appeals violated petitioner's Constitution of the United States First Amendment right to free speech and public access to judicial documents, and compromised the public's confidence in the judiciary, when the court granted Respondent Mello's motion to seal the file, summarily ordering both the Eighth Circuit court file and district court file, in their entirety, permanently sealed, to all persons, including Petitioner Viehweg, without on the record findings showing that restriction of the first amendment right of public access was necessitated by a compelling government interest, that the sealing was essential to preserve higher values, and that the order was narrowly tailored to that interest.

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CASE CITATIONS

At the district court level this case is cited as *Viehweg v. Mello* 5 F.Supp 2d 752 (E.D. Mo. 1998). On appeal to the Eighth Circuit Court of Appeals, No. 98-2732EMSL, the appellate court's opinion was issued per curiam and not published. On petition to the Supreme Court for a writ of certiorari, No. 99-1592, the case has been briefed and the petition is pending.

BASIS OF JURISDICTION

The final order sought to be reviewed was entered by the United States Court of Appeals, Eighth Circuit, on February 17, 2000 - four months after the Eighth Circuit issued its opinion.

The order seals both the Eighth Circuit court file, and the district court file, in their entirety, and applies to all persons, including the parties. It denies Viehweg any access to the court file without a prior court order, whether for purposes of appeal, or otherwise. It's immediate, and permanent.

This Court has jurisdiction to hear this petition for writ of Certiorari based upon U.S.C. 28 §1254.

CONSTITUTIONAL PROVISIONS

First Amendment of the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Throughout this case, issues have been raised and vigorously argued as to the nature and legality of Ms. Mello's self-representation, especially when she is simultaneously represented by legal counsel.

Ms. Mello maintains, that as she is a licensed Missouri attorney, and a member of the federal court bar, she can enter her appearance as legal counsel on behalf of herself. The district court and the Eighth Circuit agreed with her and accepted her appearance as legal counsel for herself. Viehweg has strongly objected on the basis that the state of Missouri does not recognize the act of a natural person representing herself in a court of law as the practice of law.

Ms. Mello also maintains, that as she is a member of the court bar, and her legal counsel is provided by her legal malpractice insurance, she is exempt from the restrictions of U.S.C. 28 §1654, which the federal courts have interpreted as barring simultaneous representation of pro se parties by legal counsel. Viehweg has strongly objected on the basis that such an exemption would be unconstitutional by restricting only Viehweg's non-attorney party class, and not Ms. Mello's attorney party class.

Ms. Mello maintains that the nature of her representation in the courts is proper. Viehweg maintains that the courts are granting Ms. Mello special and favorable treatment, unsupported by law, because she is an attorney member of the court's bar being sued for legal malpractice by a non-attorney pro se, and that such treatment amounts to partiality.

While this case was at the district court level, the only documents Mello moved to seal, and the only documents that were sealed, were the transcript and video of Mello's deposition. Although over one-hundred documents had been filed with the court, Mello never moved to seal any other document.

While this case was on appeal to the Eighth Circuit, Mello filed a motion to seal the file. Her motion was taken with the case (See Appendix A3) and ultimately denied by the panel to which the case had been submitted for disposition on the merits (See Appendix A4).

Subsequent to the Eighth Circuit's entering its final opinion on the case, Viehweg informed Ms. Mello that he intended to pursue these legal issues outside of the court action. Viehweg stated that if the court's application of law was in error, then the public had the right to know and voice its opinion. Viehweg further stated that if the court's application of law was not in error, then maybe the law needed to be changed.

Mello responded to Viehweg's statements by filing another motion to seal the Eighth Circuit file. Mello's motion contained seventy-eight pages of exhibits, and was half an inch thick. The motion did not refer to specific documents in the file, and was not supported by affidavits. It was signed and submitted by her attorney Gerard T. Noce of Noce and Buckley. Viehweg filed a response in opposition.

At the same time, Mello filed a word for word identical motion in the district court to seal its file.

At the same time, Mello filed word for word identical motions in the St. Louis County Circuit Court and the Missouri Court of Appeals for the Eastern District to seal their files, where documents from the federal cases had been submitted as evidence in a parallel state action.

On February 9, 2000, the Missouri Court of Appeals denied Mello's motion to seal its file (See Appendix A5).

On February 17, 2000, the Eighth Circuit Clerk, Michael E. Gans, at the direction of the court, summarily ordered the file sealed (See appendix A1). No hearing on the matter was held, and no findings were made. Notices of the order were addressed by the court clerk directly to appellee Mello as "Dear Counsel", and not to the attorney who had signed and submitted the motion on her behalf (See Appendix A2).

On or about February 23, 2000, Mello moved for the Missouri Appellate Court to reconsider her motion to seal the file. The motion (See Appendix A6) contains the following:

> On February 9, 2000, before this Court had knowledge that the Eighth Circuit had granted respondent's Motion to Seal, this Court denied respondent's Motion ..... Reconsideration of this Court's denial of Respondent's Motion ..... is especially proper, at least as to the ruling on the Motion to Seal, in order to achieve consistent judgments.

On February 29, 2000, the Missouri Appellate Court denied Mello's motion to reconsider (See Appendix A8). Mello abandoned her motion to seal the file in the state circuit court.

On or about April 10, 2000, Mello filed in the district court her motion to view the sealed file and copy documents.

On April 12, 2000, the district court entered its order denying as moot Mello's motion to seal the district court file insofar as the record had been ordered sealed by the Eighth Circuit (See Appendix A9). The order also granted Mello's motion to view the sealed file and copy documents with the following provision:

> "that the viewing of the file is limited to the purpose of preparing a response to the petition for a writ of certiorari, Defendant's counsel gives one day's notice to the Clerk's office of his or her intent to view the file, and the copied documents are destroyed once the response to the petition is filed."

Viehweg, being denied access to the federal court files, files this petition.

REASONS TO GRANT THE PETITION

In determining whether the first amendment right of public access extends to a particular type of proceeding, the Supreme Court considers "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *In Re Search Warrant for Secretarial Area-Gunn* 855 F.2d 569, 572-573 (8th Cir. 1988); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct 2735, 2740, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*)

Under the common law, judicial records and documents have been historically considered to be open to inspection by the public. The courts of this country recognize a general right to inspect and copy judicial records and documents. Public access to judicial records is important to the public's keeping a watchful eye on the function and operation of the judicial process and operates as a curb on judicial misconduct. *In Re Search Warrant for Secretarial Area-Gunn* 855 F.2d 569,573 (8th Cir. 1988); *Nixon V. Warner Communications, Inc.*, 435 U.S.589, 597-99, 98 S.Ct. 1306, 1312[1], 55 L.Ed.2d 570 (1978)

The first amendment right of public access to judicial records is a qualified right. Documents may be sealed if specific on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to that interest. The party seeking sealing must show that such a restriction of the first amendment right of public access is necessitated by a compelling government interest. If the court decides to seal certain documents, it must explain why sealing was necessary and why less restrictive alternatives were not appropriate. The court's findings must be specific enough to enable a superior court to determine whether its decision was proper. *In Re Search Warrant for Secretarial Area-Gunn* 855

F.2d 569,574 (8th Cir. 1988); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct 2735, 2740, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501,510, 104 S.Ct 819, 824, 78 L.Ed.2d 629 (1984) (*Press-Enterprise* I)

Mello's decision to not move to seal the file at the district court level, before the appeal to the Eighth Circuit, raises the presumption that there were insufficient grounds to seal any of the district court documents, other than the transcript and video of Mello's deposition which had already been sealed. The Eight Circuit's opinion denying Mello's first motion to seal the file raises the presumption that there were insufficient grounds to seal any of the Eighth Circuit Court documents.

The Missouri Court of Appeals for the Eastern District order denying Mello's motion to seal its file, and the court's order denying Mello's motion for reconsideration, raises the presumption that Mello's motion failed to raise sufficient grounds to seal any of the state court records, even though the state court records included numerous copies of the district court and Eighth Circuit court documents.

The Eight Circuit's summary order sealing the entire file of both the Eighth Circuit and the district court, to all persons, including the parties, absent any on the record findings, raises the presumption that Mello could not show, and that the court could not find, that restriction of the first amendment right of public access was necessitated by a compelling interest, that sealing was essential to preserve higher values, and that the order was narrowly tailored to that interest. It further raises the presumption that the court's order was entered solely to thwart Viehweg's first amendment right of free speech regarding, and the public's scrutiny of, the court's application of law regarding the issue of Mello's self-representation

The Eighth Circuit's notice of its order sealing the file, addressed to Ms. Mello instead of her attorney who submitted the motion, raises the presumption that it granted Mello's

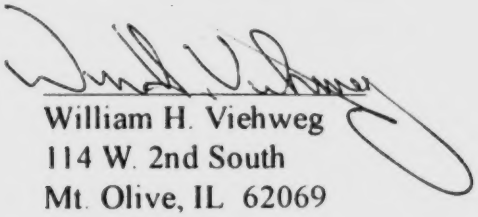
request, not based upon law, but as a professional favor to Ms. Mello as a member of its bar.

Viehweg's first amendment right to free speech has been violated by the Eighth Circuit order sealing the file. Viehweg is denied access to the file for purposes of speaking about the court's application of law regarding the issue of Mello's self-representation. Viehweg's is also prejudiced as he does not have immediate access to the file for purposes of appeal.

CONCLUSION

The law concerning the sealing of federal court documents is clear. The Eighth Circuit's order summarily sealing the entire Eighth Circuit and district court file to all persons, including the parties, without on the record findings, fails to meet the standards required to seal judicial records. Viehweg's first amendment right of free speech and access to judicial records has been violated. The public's confidence in the judiciary has been compromised. The Eighth Circuit Court order granting Mello's motion to seal the file should be reversed.

Respectfully submitted,



William H. Viehweg
114 W. 2nd South
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(314) 999-5061
Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 98-2732EMSL

William H. Viehweg,
Appellant,
v.
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

The appellee's motion to seal the court file has been considered by the court and is granted. The motion is denied in all other respects. (5120-010199)

February 17, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Untied States Court Of Appeals
For The Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

February 17, 2000

Ms. Susan H. Mello
Room 403
7751 Carondelet
St. Louis, MO 63105

Re: 98-2732 William H. Viehweg vs. Susan H. Mello

Dear Counsel:

Enclosed is a copy of an order entered today in the above case at the direction of the court.
(5009-010199)

Sincerely,
/s/ Michael E. Gans
Michael E. Gans
Clerk of Court

kas

Enclosure(s)
cc: Hon. Thomas C. Mummert, US Magistrate Judge
William H. Viehweg
Gerard T. Noce
James G. Woodward, Clerk

District Court/Agency Case Number(s): 4:97 CV 211 TCM

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

NO. 98-2732EMSL

William H. Viehweg,
Appellant,
v.
Susan H. Mello,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Appellee's motion for leave to file a corrected brief is granted. The brief filed November 9, 1998 is withdrawn, and the brief submitted November 12 is substituted for that brief.

Appellee's motion to seal the file is taken with the case for consideration by the panel to which this case is submitted for disposition on the merits.

November 27, 1998

Order Entered Under Rule 27B(a):

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 98-2732

William H. Viehweg,
Appellant,
v.
Susan H. Mello,
[UNPUBLISHED] Appellee.

SUBMITTED: October 7, 1999 FILED: October 18, 1999
Before BEAM, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

William H. Viehweg appeals the district court's[1] adverse grant of summary judgment in his diversity legal malpractice action against attorney Susan Mello. Mr. Viehweg alleged Ms. Mello breached her fiduciary duty and acted negligently when she withdrew from representing him in an action against his former employer. Upon de novo review, see Kunferman v. Ford Motor Co., 112 F.3d 962, 965 (8th Cir. 1997), we conclude summary judgment was proper. We believe an extended opinion is unnecessary, and we affirm the judgment of the district court. See 8th Cir. R. 47B.

We deny all pending motions on appeal.

---

[1] The Honorable Thomas C. Mummert, III, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. §636(c).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

William H. Viehweg,
Plaintiff,

v. No. 4:97CV00211 TCM

Susan H. Mello,
Defendant.

ORDER

Judgment was entered in this diversity case in favor of Defendant in May 1998. The judgment was affirmed by the Eighth Circuit Court of Appeals in a one-paragraph, per curiam opinion issued in October 1999. Pending now are three motions filed by Defendant: a motion to seal the record and for protective order; a motion for an order allowing oral argument on the foregoing motion; and a motion for order allowing Defendant to view the sealed file and copy documents. This later motion is occasioned by Plaintiff having filed a petition for writ of certiorari and the Eighth Circuit Court of Appeals having entered an order sealing the district court file at Defendant's request. Having reviewed the record and the parties' pleadings,

IT IS HEREBY ORDERED that Defendant's motion to seal the record and for protective order is DENIED as moot insofar as the record has been ordered sealed by the Eighth Circuit Court of Appeals and is DENIED in all other respects. [Doc. 135]

IT IS FURTHER ORDERED that Defendant's motion for oral argument is DENIED. [Doc. 139]

IT IS FINALLY ORDERED that Defendant's motion to view the sealed file and copy documents is GRANTED provided that the viewing of the file is limited to the purpose of preparing a response to the petition for a writ of certiorari, Defendant's counsel gives one day's notice to the Clerk's office of his or her intent to view the file, and the copied documents are destroyed once the response to the petition is filed. [Doc. 141]

/s/ Thomas C. Mummert, III
Thomas C. Mummert, III
United States Magistrate Judge

Dated this 12th day of April, 2000.

MISSOURI JUDICIARY
EASTERN DISTRICT CT OF APPEALS
Motion Rulings

Report: CZR0007

Date: 29-Feb-2000
Time: 3:08:19PM
Page: 1

ED76141

William H. Viehweg, App vs. Susan H. Mello, Res.

Motion to Reconsider
Filed by: NOCE, GERARD THOMAS

29-Feb-2000 Denied

MISSOURI JUDICIARY
EASTERN DISTRICT CT OF APPEALS
Motion Rulings

Report: CZR0007

Date: 9-Feb-2000
Time: 2:06:39PM
Page: 1

ED76141

William H. Viehweg, App vs. Susan H. Mello, Res.

Motion to Seal
Filed by: NOCE, GERARD THOMAS

9-Feb-2000 Denied

THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT.
EASTERN DIVISION

William H. Viehweg,
Appellant,

v. Appeal No. ED76141

Susan H. Mello,
Respondent.

Respondent's Motion To Reconsider Her Motion to Seal The Court File Records And For A Protective Order, And Supplemental Motion In Light Of The Eighth Circuit's Ruling Granting The Motion To Seal

COMES NOW Respondent, Susan H. Mello, by and through counsel Noce & Buckley L.L.C., and for her Motion for Reconsideration states to the Court as follows:

1. Respondent filed her Motion to Seal the Court File Records and for a Protective Order on January 26, 2000. (A copy of that Motion is attached hereto as Exhibit A.)

2. On February 9, 2000, before this Court had knowledge that the Eighth Circuit had granted respondent's Motion to Seal, this Court denied respondent's Motion. (A copy of the Eighth Circuit's ruling is attached hereto as Exhibit B.)

3. Reconsideration of this Court's denial of Respondent's Motion to Seal the Court File Records and for a Protective Order is especially proper, at least as to the ruling on the Motion to Seal[1], in order to achieve consistent judgments. This is especially proper, whereas this Court found it was without jurisdiction and with the appeal here only ancillary to the now sealed Eighth Circuit appeal.

WHEREFORE, Ms. Mello requests that this Court reconsider its prior ruling, and enter its order sealing the court file records in the above captioned case, staying any ruling on the protective order until after Judge Mummert can hear same.

---

[1] Respondent's Motion for Protective Order is awaiting hearing by Judge Mummert, United States District Court.

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